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No. 87-1911

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
*Petitioners,*

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the immunity provided by § 11341(a) of the Interstate Commerce Act from "all other law * * * as necessary to let [a party] carry out" a transaction subject to ICC jurisdiction under § 11343 of the Act includes Railway Labor Act requirements that would prevent a carrier from carrying out such a transaction as authorized by the ICC?

2. Whether, if parties to such transactions are immune under § 11341(a) from inconsistent Railway Labor Act obligations, that immunity is lost when the ICC employs expedited approval procedures under § 10505, even though under § 10505(g) the ICC's mandatory duty to impose labor protective conditions on its approval of § 11343 transactions is unaffected by use of the § 10505 procedure?

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents Guilford Transportation Industries, Inc., Boston & Maine Corporation ("B&M"), Maine Central Railroad Company ("MEC"), Portland Terminal Company ("PT"), and Springfield Terminal Railway Company ("ST")[1] respectfully request that the petition for writ of certiorari be denied.[2]

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[1] Guilford Transportation Industries, Inc. is a private holding company; respondents B&M, MEC, PT, and ST are wholly-owned subsidiaries of Guilford. Respondents' subsidiaries and affiliates within the meaning of Rule 28.1 are Albany Port Railroad, Albany & Vermont Railway Company, Guilford Aviation Corporation, Guilford Motor Express, Inc., Hudson River Estates, Inc., Northern Railroad, Railstar Control Technology, Inc., Saratoga and Schenectady Railroad Corporation, and Vermont and Massachusetts Railroad Company.

[2] On June 20, 1988, Respondent Delaware & Hudson Railway Company ("D&H") filed a petition for reorganization under Chapter 11

## STATEMENT OF THE CASE

This case arises from one of several attempts by petitioners Railway Labor Executives' Association and its member labor unions (hereafter collectively "RLEA"), on behalf of certain employees of respondents B&M, D&H, MEC, and PT, to thwart the implementation of leases of rail lines from these railroads to their corporate affiliate, ST, as approved by the Interstate Commerce Commission ("ICC"). Such transactions are subject to ICC jurisdiction under § 11343 of the Interstate Commerce Act, and the leases here were authorized by the Commission subject to labor protective conditions for affected employees prescribed by the Commission under § 11347 of the Act.

Section 11343 provides that "a purchase, lease, or contract to operate property of another carrier by any number of carriers" may "be carried out only with the approval and authorization of the Commission." 49 U.S.C. § 11343(a)(2). The statutory procedures for obtaining prior Commission review and approval of § 11343 transactions are set forth in §§ 11344 and 11345 of the Act. These are detailed and time-consuming, calling for notice to state governors, potential competitors and other interested parties, and public hearings in many cases. 49 U.S.C. §§ 11344(a); 11345(c). The ICC has authority under § 10505 of the Act to exempt § 11343 transactions, either on an individual or class basis, from these statutory prior review requirements, although when it does so it retains jurisdiction to subject an exempted transaction to detailed after-the-fact scrutiny either on its own

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of the Bankruptcy Code, 11 U.S.C. § 1161 *et seq.*, in the United States Bankruptcy Court for the District of Delaware, and this brief is not filed in its behalf. Although §§ 362(a)(1) and (3) of the Code automatically stay these proceedings against D&H, they do not preclude this Court from denying the petition as against the other respondents; the automatic bankruptcy stay does not apply to non-bankrupt co-defendants. See, *e.g.*, *Teachers Ins. Annuity Ass'n* v. *Butler*, 803 F.2d 61, 65 (2d Cir. 1986), and cases cited therein.

motion or on a petition from an interested party, and may revoke the exemption if that is required by some policy of the Act. 49 U.S.C. § 10505(d).

The ICC lacks the power under § 10505, however, to exempt transactions subject to § 11343 from employee protection requirements applicable to authorization of such transactions. Section 10505(g)(2) provides that the Commission may not "relieve a carrier of its obligation to protect the interests of employees" under other applicable provisions of the Act. Such protection is required as a condition of approval of § 11343 transactions by § 11347 of the Act, under which the Commission must impose employee protection conditions upon the rail carriers participating in any such transaction.[3]

In this case, because both ST and the lessor railroads are carriers under the Interstate Commerce Act, "approval and authorization" of the leases was required under § 11343. The ICC, however, has exempted most transactions "within a corporate family" from the statutory prior review requirements of §§ 11344 and 11345. Instead, it has authorized consummation of these trans-

[3] Section 11347 provides, in pertinent part:

> "When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). * * * The arrangement and order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective for that lesser period.)"

In implementing this section the ICC has formulated differing sets of labor protections for the various types of § 11343 transac-

actions seven days after the filing of notice to the Commission specifying the appropriate level of labor protection required by Commission decisions for affected employees. 49 C.F.R. §§ 1180.2(d)(3), 1180.4(g)(1). Such transactions remain subject to retroactive ICC review to ensure that the stipulated protection meets statutory requirements, however, upon petition by interested parties. 49 U.S.C. § 10505(d). Beginning in October 1986, the Guilford railroads invoked this class exemption to obtain ICC approval of the leases to ST, specifying in their notices that the so-called *Mendocino* protections generally applicable to leases (see n.3 *supra*) would be provided. 51 Fed. Reg. 42,143 (November 21, 1986); see also J.A. 89-129.[4]

Beginning in October 1986, RLEA and certain of its member unions filed a series of petitions with the ICC seeking imposition of the so-called *New York Dock* conditions on the ST leases, instead of the *Mendocino* condi-

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tions. These conditions all require that carriers negotiate with their employees' representatives for an agreement to implement work-force changes, that this issue be submitted for binding arbitration if no implementing agreement can be reached within a specified period, and that employees who are dismissed or displaced because of a transaction receive their pre-dismissal or pre-displacement wages for up to six years, among other benefits. See *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979) (conditions for rail mergers and acquisitions), *aff'd sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979); *Mendocino Coast Ry.—Lease & Operate—California Western R.R.*, 354 I.C.C. 732 (1978) (conditions for rail leases), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom. RLEA* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982); *Norfolk & W. Ry.—Trackage Rights—Burlington N.*, 354 I.C.C. 605 (1978) (conditions for trackage rights transactions), *modified*, 360 I.C.C. 653 (1980), *aff'd sub nom. RLEA* v. *United States*, 576 F.2d 1248 (D.C. Cir. 1982).

[4] "J.A." citations refer to the parties' Joint Appendix filed in this case with the United States Court of Appeals for the First Circuit. "Pet. App." citations refer to the Appendices to the Petition for Certiorari and to RLEA's Supplemental Brief ("Supp. Br."). "Opp. App." citations refer to the Appendix to this Brief in Opposition.

tions, contrary to the ICC's usual practice in lease transactions.[5] In several of the petitions RLEA also asked the ICC to stay consummation of the leases pending determination of the appropriate level of labor protection (J.A. 131), and ultimately RLEA asked the ICC to revoke its authorization of the leases (Pet. at 9 n.9.)

On January 28, 1987, while the ICC proceedings on the union petitions were pending, RLEA and its member unions commenced this action in the United States District Court for the District of Maine, asking the court to order imposition of *New York Dock* conditions, rather than *Mendocino* conditions.[6] RLEA also sought to enjoin consummation of the leases under the Railway Labor Act. According to RLEA "the sole purpose" of these transactions was to "avoid[] existing [collective bargaining] agreements and practices which governed" the working conditions on the lessor carriers, by requiring employees of these carriers to "accept jobs with ST" and to work under the ST's labor agreement. RLEA therefore claimed that the lessor carriers were obliged to exhaust the Railway Labor Act's "major dispute" procedures for collective bargaining over proposals for relief from their

[5] The ICC applies *Mendocino* conditions to leases, *New York Dock* conditions to mergers. See n.3 *supra*. The sole relevant difference between the two sets of conditions is that under *New York Dock*, the carrier is required to negotiate or arbitrate an implementing agreement before consummating the transaction; under *Mendocino*, the carrier may consummate after 20 days of negotiations, even if no implementing agreement has yet been reached, and when the required implementing agreement is later established by negotiation or arbitration it is applied retroactively. Compare *New York Dock*, *supra*, 360 I.C.C. at 85, *with Mendocino*, *supra*, 360 I.C.C. at 663.

[6] On January 30, 1987, the district court *sua sponte* dismissed RLEA's Interstate Commerce Act claim for *New York Dock* protections, holding that the appropriate level of labor protection was a matter for the ICC to determine on RLEA's pending petitions (J.A. 65.) In its final judgment, the district court refused RLEA's motion to reinstate that claim (Pet. App. 6a-13a.) RLEA did not appeal this part of the district court's judgment.

collective bargaining agreements before implementing the leases and to maintain the "status quo" for "rates of pay, rules, and working conditions" in the meantime; RLEA claimed that the leases must be enjoined to preserve that status quo. Complaint ¶¶ 13, 15, 18, 28, 32, and Prayer.

In May 1987, the ICC announced that it would conduct a detailed examination of all the pending ST lease cases and "the impact of the transactions on employees." *Delaware & Hudson Ry. Co.—Lease & Trackage Rights Exemption—Springfield Terminal Ry. Co. et al.*, Finance Docket No. 30965 (served May 18, 1987) (J.A. 130). It declined at that time, however, to stay the leases pending resolution of the labor protection issue. *Id.*

On June 19, RLEA went back to the district court, seeking a preliminary injunction against the leases under the Railway Labor Act. Respondents moved to dismiss RLEA's Railway Labor Act claim. On July 27, 1987, the district court issued a final judgment dismissing the Railway Labor Act claim for lack of subject matter jurisdiction. The court relied on § 11341(a) of the Interstate Commerce Act, which provides that the ICC's authority over § 11343 transactions is "exclusive," and that a carrier party to such a transaction approved by the ICC "is exempt from the antitrust laws and from all other law * * * as necessary to let that person carry out the transaction * * *." The court held that its judgment in that regard was controlled by *Brotherhood of Loc. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986), where the First Circuit had held that § 11341(a) preempted application of Railway Labor Act major dispute procedures to a § 11343 lease that the ICC had approved by an exemption under § 10505 (Pet. App. 14a-16a.)

RLEA appealed that ruling to the First Circuit. In an unpublished *per curiam* order entered January 20,

1988, the court of appeals "summarily affirm[ed] the district court's dismissal of this action on the basis of the panel opinion in *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*," *supra*, and found no basis for referring the appeal to the full court so that it might consider overruling its 1986 precedent, as RLEA had asked (Pet. App. 2a.)

On February 25, 1988, the ICC issued its ruling on the RLEA petitions for increased labor protection and to revoke the lease authorizations. It refused to order revocation of the lease authorizations.[7] It held, however, that "extraordinary labor protective conditions" were warranted "[b]ecause of the system-wide impact of the [lease] arrangement and the substantial impact on numerous rail employees * * *" (Pet. App. 23a, 30a-31a.) The ICC therefore ordered the carriers and the unions to reach implementing agreements for all of the leases or to establish an implementing arrangement by arbitration before any additional leases are consummated. *Id.*

The parties were unable to negotiate an implementing agreement, and the dispute was submitted to arbitration in accordance with the ICC order. On June 12, 1988, the arbitrator issued his award, holding that ST must select employees to perform work on the leased lines in accordance with the lessors' seniority rosters and rules, that "ST, in operating the leased lines, facilities and properties," shall abide by the "applicable collective bargaining agreement[s]" of the lessors, and that "[a]ll B&M, D&H, MEC, PT, and ST employees shall be made-whole for any loss of earnings suffered or extraordinary work-related expenses incurred during the period from

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[7] RLEA has asked the ICC to reconsider the demand for revocation, on the ground that the Commission failed in authorizing the leases to "consider the impact of its rulings" on "employees' Railway Labor Act and contractual rights." (Pet. at 20 n.17, & n.9.)

which first adversely affected by a lease until the effective date of this implementing arrangement" (Opp. App. 3a § 1, 4a §3, 7a § 7.) The carriers plan to appeal that award to the ICC.

## INTRODUCTION AND SUMMARY OF ARGUMENT

RLEA has attempted to present this case as the "best vehicle available today to resolve * * * crucial issues" as to which the circuits are allegedly in conflict in other pending cases arising from other exempted rail line dispositions (Pet. at 25, 16-17).[8] But the questions presented here—(1) whether § 11341(a) preempts the Railway Labor Act in § 11343 transactions subject to mandatory labor protection under § 11347, and if so, (2) whether § 11343 transactions authorized through § 10505 exemptions rather than through detailed §§ 11344 and 11345 notice and hearing procedures are entitled to that § 11341(a) immunity—are entirely different from the questions presented in the other cases RLEA wishes to have this one substituted for. Those cases all arise under § 10901 of the Interstate Commerce Act, rather than § 11343, and thus are subject to neither § 11341(a) immunity nor mandatory labor protection under § 11347; indeed, the ICC generally refuses to provide labor protection in § 10901 transactions.[9] While these differences have indeed led to a conflict among the circuits on the question whether the Railway Labor Act is preempted in

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[8] See also Brief of Respondent In Response to The Petition, at 2 n.2, On Petition for Certiorari to the United States Court of Appeals for the Third Circuit, *Pittsburgh & Lake Erie Railroad Company* v. *Railway Labor Executives' Association*, Supreme Court No. 87-1589.

[9] See *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C. 2d 810 (1985), *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).

§ 10901 transactions[10], this case does not present that question and cannot serve as a vehicle to resolve that conflict.

Nor does this case warrant review on its own merits: (1) It presents no issue that warrants review, because the decision below is clearly required by the plain terms of §§ 11341(a), 11347, and 10505(g). (2) There is no conflict among the circuits on the questions presented here; the decisions of the courts of appeals all support it. (3) The decision below is consistent with and indeed is mandated by applicable decisions of this Court. (4) And, even if the questions presented here were substantial, the unique facts of this case, including the ICC's imposition of extraordinary labor protections and the recent arbitration award which if upheld will moot the case, make this case unsuitable for review by this Court. For each of these reasons certiorari should be denied.

## ARGUMENT

### I. The Decision Below Is Plainly Correct On The Face Of The Statute.

The petition presents two questions: (1) whether the immunity under § 11341(a) from "all other laws" that would prevent the carrying out of a transaction subject to ICC jurisdiction under § 11343 includes inconsistent Railway Labor Act requirements (the § 11341(a) issue), and (2) if it does, whether that immunity is lost because the leases here were authorized by a § 10505 exemption (the § 10505 issue). The answers below—yes, and no, respectively—are plainly correct on the face of the Interstate Commerce Act, and thus present no debatable issue warranting review by this Court.

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[10] Compare *RLEA* v. *Chicago & N.W. Transp. Co.*, No. 87-5071 (8th Cir. May 31, 1988), *petition for certiorari pending*, S. Ct. No. 87-2049, *with RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *petition for certiorari pending*, S. Ct. No. 87-1888.

A. *Section 11341(a).* In this case, the ICC authorized the carrying out of the leases seven days after notice to the Commission and refused later to stay the leases or order them rescinded. RLEA claims nevertheless that under the Railway Labor Act it is entitled to an injunction to stop the carriers from carrying out the leases pending exhaustion of the "almost interminable" [11] major dispute procedures under that Act, leaving the unions free to strike to stop the transactions thereafter, and that these supposed Railway Labor Act requirements override the ICC authorization. Under § 11341(a) of the Interstate Commerce Act, however, a person participating in a transaction requiring ICC authorization under § 11343 is "exempt from the antitrust laws and all other law * * * as necessary to let that person carry out the transaction * * *." 49 U.S.C. § 11341(a). Thus the courts below were plainly correct in rejecting RLEA's contention. It cannot sensibly be asserted that preemption of Railway Labor Act requirements that would *prevent* the carriers from carrying out transactions as authorized by the ICC is not "necessary to let [the carriers] carry out the transaction[s]." 49 U.S.C. § 11341(a).

B. *Section 10505.* RLEA contends that the ST leases nevertheless lost any immunity under § 11341(a) because they were authorized, procedurally, by § 10505 exemptions. That is plainly incorrect, because under § 11347 the ICC must impose labor protective conditions on its approval of transactions subject to ICC jurisdiction under § 11343; and under § 10505(g) that approval requirement is unaffected by the ICC's use of its § 10505 power to exempt such transactions from other statutory conditions and procedures for approval: "The Commission may not exercise its authority under this section to * * * relieve a carrier of its obligation to protect its

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[11] *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969).

employees as required by this subtitle," *i.e.*, by § 11347, *inter alia*.[12] 49 U.S.C. § 10505(g)(2). In short, to the extent that a § 11343 transaction affects employees, it must be approved in an order under § 11347, and thus must be "approved" within the meaning of § 11341(a)—even if it is otherwise exempted from the Act's approval requirements.

**II. There Is No Conflict Among The Circuits Or With Decisions Of This Court.**

A. *Section 11341(a).* 1. In an unbroken line of cases going back more than twenty-five years, the courts of appeals have held that where the Railway Labor Act conflicts with implementation of a transaction authorized by the ICC under § 11343 (or its predecessor, former § 5(2)), that Act is preempted by § 11341(a) of the Interstate Commerce Act (or its predecessor, former § 5(11)).[13] Contrary to RLEA's assertion that until recently no court ever found "that there was in fact an irreconcilable conflict between those two Acts of Congress" (Pet. at 14), this rule is based on the courts' long-standing recognition that there is an inherent conflict

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[12] "This subtitle" means the Interstate Commerce Act, 49 U.S.C. subtitle IV.

[13] *United Transp. Union* v. *Norfolk & W. Ry.*, 822 F.2d 1114, 1122 (D.C. Cir. 1987); *Missouri Pacific R.R.* v. *United Transp. Union*, 782 F.2d 107, 111 (8th Cir. 1986); *Burlington Northern, Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972); *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971); *Brotherhood of Loc. Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir. 1963); *Texas & N.O. Ry.* v. *Brotherhood of R.R. Trainmen*, 307 F.2d 151, 161-62 (5th Cir. 1962). See also *ICC* v. *Brotherhood of Loc. Engineers*, 107 S. Ct. 2360, 2370 (1987) (Stevens, J., concurring).

Former §§ 5(2) and 5(11) were recodified "without substantive change" in pertinent part as §§ 11343 and 11347, and 11341(a), respectively, in 1978. See Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 (1978).

between the Railway Labor Act's major dispute procedures, which RLEA seeks to invoke, and the Interstate Commerce Act's provisions giving the ICC exclusive jurisdiction to determine whether rail transactions under § 11343 should go forward and to impose labor protection for employees affected by such transactions.

The Railway Labor Act's major dispute procedures "leave the parties wholly free, at their own will, to agree or not agree." *Elgin J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 725 (1945).[14] The procedures "are purposely long and drawn out," and the parties are prohibited from making unilateral changes in working conditions pending their exhaustion, "based on the hope that reason and practical considerations will in time provide an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C. Ry.*, 384 U.S. 238, 246 (1966); see *Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969). "But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." *Elgin, J. & E. Ry., supra*, 325 U.S. at 725; see 45 U.S.C. § 155 First. Thus, upon exhaustion of the Act's procedures carriers are free to unilaterally implement changes they wish to make, but the unions are likewise free to resort to strikes and nationwide secondary picketing to block such changes. *Florida E.C. Ry., supra*, 384 U.S. at 244; *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841 (1987).

As the Sixth Circuit recognized in 1971 in *Nemitz* v. *Norfolk & W. Ry., supra*, these major dispute procedures are wholly incompatible with the Interstate Commerce Act's vesting of "exclusive" jurisdiction in the Commis-

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[14] See also *Chicago & N.W. R. Co.* v. *Transportation Union*, 402 U.S. 570, 579 n.11 (1971).

sion to decide whether rail transactions should be permitted to go forward: "Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here * * * would threaten to prevent many [ICC-approved transactions under former § 5(2)], and, therefore, should not be applied." 436 F.2d at 845.

The Eighth Circuit reached the same conclusion in *Brotherhood of Loc. Engineers* v. *Chicago & N.W. Ry.*, *supra*, where the union sought to avoid mandatory arbitration under an ICC labor protection order and instead to proceed under the Railway Labor Act's major dispute procedures, under which the union would have been free to reject arbitration and instead resort to self-help. 314 F.2d at 427-28. Contrary to RLEA's mistaken assertion that the court in that case "noted that there was no conflict between the two Acts" (Pet. at 15 n.12), the court stated that "under the Railway Labor Act [major dispute] provisions, it is possible for either party to completely block any change in working conditions by refusing to arbitrate. * * * [T]he Railway Labor Act, if it applied, would threaten to prevent many" ICC-approved transactions, and thus to hold it applicable "would be to disregard the plain language of § 5(11) * * *." 314 F.2d at 431.

The more recent preemption decisions that RLEA characterizes as a dramatic departure from formerly settled law employ exactly the same analysis as the earlier decisions. For example, in *Missouri Pacific*, *supra*, the Eighth Circuit recognized that allowing unions to strike under the Railway Labor Act over a § 11343 transaction would effectively give them "carte blanche authority * * * to block" transactions approved by the ICC, a result that Congress sought to avoid by vesting the ICC with authority under § 11347 to "resolve [labor] disputes during the approval proceedings." 787 F.2d at 112.

2. The holding below that § 11341(a) supersedes inconsistent Railway Labor Act requirements likewise conforms to decisions of this Court. In particular, in *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971), this Court held that the labor protection terms of the Commission's authorization of a transaction approved under the predecessor to §§ 11343 and 11347 were not subject to alteration under the Railway Labor Act. This Court has recognized since 1939 that the Commission's power to impose labor protective conditions on transactions between carriers, now codified in § 11347 of the Act, is "an essential aid to the maintenance" of the interstate rail system "uninterrupted by labor disputes * * *." *United States* v. *Lowden*, 308 U.S. 225, 235-36 (1939); see *Railway Labor Ass'n* v. *United States*, 339 U.S. 142 (1950); *Maintenance Employes* v. *United States*, 366 U.S. 169 (1961).[15]

3. Neither *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), nor the concurring opinion of Justice Stevens in *ICC* v. *Brotherhood of Loc. Engineers*, *supra*, on which RLEA relies (Pet. at 18-20), is inconsistent with the decision below.

To be sure, as Justice Stevens pointed out, "Any tribunal that is faced with a claim that a party is violating some 'other law'" in connection with a § 11343 transaction "has the responsibility of determining whether an exemption is 'necessary to let that person carry out the transaction * * *.'" 107 S. Ct. at 2377 n.13. But to do that, a court need look only to "the scope of the approved transaction." *Id.* at 2376. It would be nonsensical

[15] RLEA asserts that in granting certiorari in *ICC* v. *Brotherhood of Loc. Engineers*, *supra*, this Court "attempted" to determine as between the Interstate Commerce Act and the Railway Labor Act "which statute prevails" (Pet. at 18), but the only question under § 11341(a) presented in that case was whether that provision is self-executing or whether the ICC is required to make specific findings in each case as to the necessity of preemption of the Railway Labor Act. See 54 U.S.L.W. 3429 (Dec. 24, 1985).

to suppose that the "scope of" the ICC's approval of these leases in this case did not extend to authorizing consummation—indeed, at the time of the court of appeals ruling, the ICC had refused to stay consummation of the leases. And as both courts below recognized, if, as RLEA contends, the Railway Labor Act's major dispute provisions would prohibit consummation of the leases, it follows *a fortiori* that preemption of those provisions is "necessary to let [the carriers] carry out the transaction * * *." 49 U.S.C. § 11341(a). No decision of this Court provides any support for RLEA's contention that in a case in which preemption is thus determined to be necessary the district courts have some residual jurisdiction "to enforce the public policies" of the Railway Labor Act to restrain authorized § 11343 transactions (Pet. at 20.)

Indeed, *McLean Trucking*, *supra*, upon which RLEA places its principal reliance, requires precisely the opposite conclusion. RLEA notes that in *McLean* this Court stated that the ICC lacks power to enforce the Sherman Act and the "numerous other laws" apart from the Interstate Commerce Act that may be claimed to apply to a transaction subject to Commission approval (Pet. at 19.) But RLEA fails to mention the basis for that conclusion: The Court held that the Sherman Act was preempted by the predecessor provisions to §§ 11341-11351 of the Interstate Commerce Act, and thus that the ICC's judgment (subject to direct review in the appropriate court) must govern all antitrust questions presented by a covered transaction; to the extent that the policies of the antitrust laws and other federal laws are relevant to the transaction, the task of enforcing them is left to the ICC, for the "'wisdom and experience of that commission,' not of the courts, must determine whether the proposed [transaction] is 'consistent with the public interest.'" 321 U.S. at 85-87 (citations omitted).

That is dispositive of RLEA's claim that this Court's prior decisions permit the district courts to "enforce the public policies" of the Railway Labor Act or any "other law" to restrain § 11343 transactions.[16]

4. In sum, there is no occasion for this Court to determine with respect to transactions subject to ICC jurisdiction under § 11343 "whether there is a conflict between the two Acts of Congress, and if so, which statute prevails" (Pet. at 18.) That issue has long since been settled. Section 11341(a) is plain on its face, and for over 25 years the issue has been resolved uniformly by the courts of appeals under § 11341(a) and its predecessor in favor of the Interstate Commerce Act.

B. *Section 10505.* There is likewise no conflict among the circuits with respect to the effect of § 10505 on § 11341(a) immunity from the Railway Labor Act. Only two courts of appeals so far have been called on to consider that question, perhaps because the Act is so plain on its face. Both have rejected RLEA's contention that § 11341(a) immunity is lost when a transaction is authorized under § 10505. *Brotherhood of Loc. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir. 1986); *United Transp. Union* v. *Norfolk & W. Ry.*,

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[16] Nor does *Seaboard R. Co.* v. *Daniel*, 333 U.S. 118 (1948), which RLEA quotes at page 19 of the Petition, support RLEA's contention. *Seaboard* arose from a railroad's action in state court to enjoin the state attorney general from enforcing a state corporation law that the ICC had determined should be preempted under the predecessor to § 11341(a); the state answered by attacking the validity of the Commission's preemption ruling and asserted the right to enforce penalties for violation of its law. 333 U.S. at 120, 123. This Court upheld the state court's jurisdiction of the action, because

> "the relief requested in the complaint was the removal of an obstruction to the railroad's obedience to the order, not its suspension or annulment. Nor did the answer seek to have the enforcement of the order enjoined, although it did question its validity as a basis for the relief sought in the complaint." *Id.* at 123.

822 F.2d 1114, 1122-23 (D.C. Cir. 1987).[17] As we have pointed out, RLEA's contention is untenable because under § 10505(g)(2) the ICC's duty to condition authorization of a § 11343 transaction on appropriate labor protection under § 11347 is unaffected by exemptions under § 10505.

These "exempted" transactions are in fact "approved or authorized" within the meaning of § 11341(a), contrary to RLEA's contentions.[18] The effect of a § 10505 exemption is merely to relieve the parties to a transaction of the lengthy prior review requirements under §§ 11344 and 11345 of the Act, but it does not and cannot relieve them from the Commission's jurisdiction to determine whether or not the transaction may be permitted. The ICC cannot grant an exemption without considering whether the transaction or class of transactions covered by the exemption runs afoul of some policy of the Act, § 10505(a), and it retains "ongoing jurisdiction to reconsider" an exempted transaction and to revoke its authorization if that is warranted, § 10505(d). See *G. & T. Terminal Packaging*, *supra*, 830 F.2d at 1235. In

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[17] *Cf. G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d 1230, 1234 (3d Cir. 1987) (rejecting argument that statutory preemption under § 10501(d) of the Interstate Commerce Act for rates approved by the ICC is not available to rates approved by means of a § 10505 exemption). As RLEA points out in its Supplemental Brief, there is one contrary district court decision, *Burlington Northern R.R.* v. *United Transp. Union*, No. 88 C 2687 (N.D. Ill. June 9, 1988) (Pet. App. H.) That court, however, mistakenly believed that the question was resolved by the Third Circuit's decision in *Pittsburgh & Lake Erie*, *supra*, (Pet. App. H at 15a), where in fact there was no question but that § 11341(a) was inapplicable because the transaction at issue fell under § 10901 of the Interstate Commerce Act, to which § 11341(a) does not apply.

[18] *Cf. Hughes Air Corp.* v. *Public Utilities Comm'n*, 644 F.2d 1334, 1337-38 (9th Cir. 1981) (Air carriers subject to the Federal Aviation Act "exempted from certification still operate with authority granted by the [Civil Aeronautics Board]. Without an exemption they would be unable to operate in interstate commerce.").

short, as the ICC has observed, § 10505 exemptions are simply an alternative "standard method used to acquire Commission approval" of line transfers of all kinds. *Class Exemption for the Acquisition & Operation of Rail Lines*, *supra*, 1 I.C.C. 2d at 811. They do not, and cannot, abdicate the ICC's exclusive authority over § 11343 transactions.[19]

That is particularly true of the ICC's exclusive authority under § 11347 over disputes over the protections to which employees affected by § 11343 transactions may be entitled, and its duty to condition authorization of such transactions on imposition of appropriate protective arrangements. Section 10505(g) requires the Commission to exercise that authority in approving any § 11343 transaction through the exemption procedures. That is why, at least where the Railway Labor Act major dispute procedures are involved, an exempted transaction cannot "be treated as though it had not been subject to review *ab initio*": "The requirement that the Commission impose labor protective conditions when it exempts a transaction from prior review merely substitutes one form of continuing oversight for another." *United Transp. Union* v. *Norfolk & W.*, *supra*, 822 F.2d at 1122.[20]

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[19] This serves to distinguish the expiration of the statutory antitrust immunity for air carrier transactions formerly subject to CAB approval and now subject to Department of Transportation approval under the Federal Aviation Act, which RLEA contends should provide the model for analysis of the effect of the partial deregulation of rail carrier transactions under § 10505 of the Interstate Commerce Act (Pet. at 23.) The Federal Aviation Act immunity provision, 49 U.S.C. app. § 1384 (Supp. III 1985), is due to be sunsetted on January 1, 1989, because air carrier transactions will become entirely free from federal regulation at that time. See 49 U.S.C. app. §§ 1551(a)(6), 1551(b)(1)(C) (Supp. III 1985).

[20] For the same reason, RLEA is not aided by ICC decisions that antitrust immunity under § 11341(a) is not available in exempted transactions (Pet. at 22.) As the ICC explained in one such recent decision, "Immunity is limited to the 'scope of the issues we

### III. This Case Is Not Representative Of Pending Cases That Do Present Issues As To § 10901 That Warrant Review, And Presents Unique Factual Circumstances That Render It Unsuitable For Review In This Court.

A. As stated in our Introduction and Summary of Argument, pp. 8-9, *supra*, RLEA has tried to present this case as the "best vehicle available to resolve * * * crucial issues" as to which the circuits are in conflict in other pending cases (Pet. at 25, 16-17). There is a conflict among the Circuits as to application of the Railway Labor Act on line sales subject to § 10901 of the Interstate Commerce Act. See n.10, *supra*. But § 10901 transactions are not subject to § 11341(a), or § 11347. Thus, the questions presented here—the effect of § 11341(a) on the application of the Railway Labor Act to a § 11343 transaction; and the effect of § 10505 on the application of § 11341(a) in view of the provisions of §§ 10505(g)(2) and 11347—are simply not involved in the § 10901 cases. The conflict in those decisions is likewise not involved here, and this case cannot serve as a vehicle to resolve it. As to the questions presented here, there is no conflict among the circuits.

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are charged to consider in providing our approval' to a transaction." *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C.2d 270, 279 (1985) (citations omitted). The ICC can exempt transactions from detailed scrutiny of potential antitrust problems; it cannot exempt the labor impacts of § 11343 transactions from scrutiny. 49 U.S.C. § 10505(g)(2). The ICC accordingly takes the position, despite its view that § 11341(a) does not confer antitrust immunity upon exempted transactions, that § 11341(a) *does* preempt the Railway Labor Act's major dispute procedures in exempted transactions: "It is [the ICC's labor protection] order, not RLA [or labor agreements thereunder] that is to govern employee-management relations in connection with the approved transaction" under §§ 10505 and 11343; any other "result we believe is unacceptable and inconsistent with section 11341 of our act * * *." *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific Ltd., & Springfield Terminal Ry.—Exemption from 49 U.S.C. 11342 and 11343*, ICC Finance Docket No. 30532 (served Sept. 16, 1985), *aff'd mem. sub nom. RLEA* v. *ICC*, 812 F.2d 1443 (D.C. Cir. 1987).

B. Moreover, wholly apart from the substantive merit of the decision below, this case is an unsuitable vehicle for review in this Court, either as a "representative" of other cases, decided under § 10901 rather than § 11343 of the Interstate Commerce Act, or on its own, because it presents unique facts that make it wholly unrepresentative of any other pending cases and may moot the case.

One factor that has led to the split in the circuits on the question whether the Railway Labor Act is preempted in § 10901 transactions is the absence of mandatory labor protection and the ICC's policy against discretionary imposition of such protection under § 10901 in the absence of unusual circumstances. The Third Circuit has concluded that unless the Railway Labor Act applies to § 10901 transactions employees will be "relegated to 'a small voice of protest'" before an unsympathetic Commission. See *e.g.*, *RLEA* v. *Pittsburgh & Lake Erie R.R.*, *supra*, 845 F.2d at 443 n.38 (citations omitted).[21] Under § 11347, however, the ICC must impose labor protection on § 11343 transactions such as the leases in this case, and thus the Third Circuit's concerns in § 10901 cases have no relevance here. In any event, the ICC found this case to be "unique," gave RLEA the benefit of intensive investigation and hearings on its complaints about the leases' effects on employees, and ultimately imposed "extraordinary labor protective conditions" on the railroads (Pet. App. 18a.) Whatever the ICC's practice may be in other cases, and whatever relevance that may have to the preemption issue there, here the ICC afforded labor a very meaningful "voice of protest."

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[21] See *id.* at 422 (noting that question presented there was "whether a railroad has a duty to refrain from completing a sale of its assets pending bargaining under the RLA over the effects of the sale on employees' working conditions, when the ICC has granted expedited approval to the (proposed) sale *without imposition of labor protective conditions*") (emphasis added).

Indeed, the ICC's remedies in this case may well satisfy RLEA's Railway Labor Act claims and render them moot. The June 12 arbitration award under the ICC's protection order requires ST to assume the lessor carriers' seniority rosters and collective bargaining agreements, and to make all employees whole for losses they have incurred through working under ST's agreement in the interim (Opp. App. 3a § 1, 4a § 3, 7a § 7.) That is the same relief RLEA sought on its Railway Labor Act status quo claim that is at issue on this petition: restoration of the "rates of pay, rules, and working conditions" in effect for employees of the lessor carriers prior to the leases. If the arbitration award withstands appeal, therefore, this case will be moot. Indeed, RLEA concedes that the arbitration award, among other events—including the Delaware & Hudson reorganization proceedings—"may eventually [a]ffect the justiciability of this case" (Supp. Br. at 5.)

* * * *

There is no conflict among the circuits as to the questions presented by this case. The decision below is plainly correct and indeed required by this Court's own decisions. The facts and legal issues presented in this case are unrepresentative of any of the pending § 10901 cases that RLEA points to as the source of "intolerable strain" in the railroad industry (Pet. at 25.) And, RLEA has just won an arbitration award that could moot its claims for relief if it is upheld on review. This case is not certworthy in its own right, and cannot serve as the proxy for any of the other cases that may warrant review.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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June 24, 1988

# APPENDIX

## APPENDIX

IMPLEMENTING AGREEMENT ARBITRATION
CONDUCTED PURSUANT TO DECISION OF
THE INTERSTATE COMMERCE COMMISSION
FINANCE DOCKET NOS. 30965, ET AL.
RICHARD R. KASHER, ARBITRATOR
JUNE 12, 1988

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IN THE MATTER OF AN IMPLEMENTING AGREEMENT ARBITRATION

SPRINGFIELD TERMINAL RAILROAD COMPANY, AND
GUILFORD TRANSPORTATION INDUSTRIES, INC.

and

THE RAILWAY LABOR EXECUTIVES' ASSOCIATION

and

THE UNITED TRANSPORTATION UNION

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Hearings Commenced: April 5, 1988

Hearings Held: April 25, 1988, Philadelphia, PA.
May 3, 1988, Washington, D.C.

Appearances:

*For Guilford Transportation Industries, Inc.*

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Margaret Coughlin LePage, Esquire
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*For Railway Labor Executives' Association*

John O'B. Clarke, Jr., Esquire
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Washington, D.C.

*For the United Transportation Union*

Eugene F. Lyden
Vice President, Portland, Maine

Hearings Concluded: May 21 and June 1, 1988 (Briefs received)

* * * *

## IMPLEMENTING ARRANGEMENT ARBITRATION AWARD

WHEREAS, the Interstate Commerce Commission (ICC) has granted all affiliated carriers an exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 11343(a)(2) for intracorporate family lease transactions;

WHEREAS, Guilford Transportation Industries, Inc. (GTI) has caused its rail subsidiaries B & M, D & H, MEC and PT (the lessors) to lease their rail operations to their corporate affiliate, the ST;

WHEREAS, the ICC has required GTI to negotiate an implementing agreement as part of the *Mendocino Coast* conditions, as modified; and

WHEREAS, GTI and its employees' representatives have been unable to reach an agreement to provide the basis upon which the forces to perform the ST operations will be selected and assigned, and to apply the terms and conditions of the modified *Mendocino Coast* conditions to these lease transactions,

The following arbitrated implementing arrangement is hereby established pursuant to Article I, Section 4 of the *Mendocino Coast* conditions:

### Section 1. Selection of Forces

Any selection and assignment of forces by the ST to perform operations over or in connection with the leased lines, facilities and property shall be made from the lessor carrier's appropriate seniority roster, in accordance with the seniority and selection of forces rules currently in effect for that lessor carrier's employees.

### Section 2. Preservation of Equity

ST employees who have performed or are performing work for the ST on or in connection with a leased line or

an ST line to which they had no seniority rights prior to the leases, shall be given the option of having their name added to the appropriate seniority roster(s) of the B & M, MEC or PT craft or class of the lessor's employees whose collective bargaining agreement governs the working conditions of the craft work which the ST employee primarily performed or is performing on that leased line. The ST employee's seniority date on the lessor's appropriate seniority roster shall be governed by the applicable collective bargaining agreement of the lessor as if the ST employee's work on the leased line was performed under the applicable collective bargaining agreement.

Section 3. Applicable Collective Bargaining Agreement

ST, in operating the leased lines, facilities and properties, shall apply the rates of pay, rules and working conditions of the lessor.

Section 4. Individual Employee Rights

No employee of the B & M, MEC or PT shall be deemed to have forfeited any rights or benefits under the *Mendocino Coast* conditions or existing collective bargaining agreements, as a consequence of any decision made, in reference to that employee's employment with any GTI subsidiary, during the period beginning when first affected by a lease and ending with the effective date of this implementing arrangement.

Section 5. Claims Procedures

(a) All claims for make-whole allowances, as provided for in Section 7 of this award, shall be filed with:

R. Akins
Guilford Transportation Industries
Human Resources Department
Iron Horse Park
North Billerica, MA. 01862

Within sixty (60) days of the effective date of this implementing arrangement. Such claims shall be made on forms to which the parties have agreed.

(b) GTI shall notify the claimant for a make-whole allowance in writing within sixty (60) days of receiving such a claim whether that employee's claim is accepted or denied. If denied, GTI shall state in detail the reason(s) for the denial. If a claim is not denied by the sixtieth day, the claim shall be considered as having been allowed as presented. A claim so allowed shall not be considered as a precedent for similar claims.

(c) All claims for separation allowances under Article I, Section 7 of the *Mendocino Coast* conditions must also be filed with Mr. R. Akins at the above address, within seven (7) days of the effective date of this implementing arrangement, or of the date of the employee's dismissal, whichever is later.

(d) GTI must notify the separation allowance claimant in writing within ten (10) days of receipt of such separate allowance request whether it accepts or denies that claim. If the claim is to be denied, GTI must state in detail the reason(s) for that denial. If a claim is not denied within the ten (10) day period, it shall be considered as having been allowed.

(e) All claims for displacement or dismissal allowances under Article I, Sections 5 or 6 of the *Mendocino Coast* conditions must be filed with Mr. R. Akins, at the above address within sixty (60) days of the close of the month for which the displacement or dismissal allowance claim is being made. Such claims shall be made on the appropriate claim forms to which the parties have agreed.

(f) GTI shall notify the displacement or dismissal allowance claimant, in writing, within sixty (60) days of the date that such a claim is filed whether it allows or denies the claim. If the claim is denied, GTI must explain in

detail the reason(s) for the denial. If the claim is not denied by the sixtieth day after it is filed, the claim shall be considered as having been allowed as presented. A claim so allowed shall not be considered as precedent for similar claims.

(g) Claims for relocation expenses incurred subsequent to the effective date of this implementing arrangement shall be presented in writing to Mr. R. Akins, at the above address, within ninety (90) days of the date that the expense or loss is incurred.

(h) GTI shall notify the relocation allowance claimant in writing within sixty (60) days of the date that such a claim is filed whether it allows or denies the claim. If the claim is denied, GTI must explain in detail the reasons for the denial. If the claim is not denied by the sixtieth day after it is filed and in the manner set forth herein, the claim shall be considered as having been allowed as presented. A claim so allowed shall not be considered as a precedent for similar claims.

(i) All claims shall be deemed filed on the date that the claim is postmarked, if mailed and properly addressed to Mr. R. Akins at the above address, or on the date that it is received by the Carrier if transmitted by any other method.

(j) Any claim denied in accordance with this Section shall be final unless the claimant or his or her representative invokes the appropriate arbitration provisions of Article I, Sections 11 or 12 of the *Mendocino Coast* conditions within sixty (60) days of the date on which the claim was denied.

Section 6. Outstanding Separation Allowances

All B & M, MEC and PT employees who previously elected to accept a separation allowance when initially unable to obtain a job with their employer in the normal exercise

of their seniority are hereby given the option of resigning and receiving a lump sum separation allowance if there is no comparable job available to them through the normal exercise of their seniority, or of returning to service with all rights unimpaired. Any employee who received a lump sum separation allowance shall be given an option to be recalled to service and if the separated employee accepts, all seniority rights shall be reinstated; an employee who accepts such a recall shall be given the option of repaying the separation allowance, less the make-whole allowance, or of having his/her compensation and/or protective allowances reduced monthly by 1/12 of the separation allowance paid until the net amount is credited.

Section 7. Make-Whole Allowances

All B & M, D & H, MEC, PT and ST employees shall be made-whole for any loss of earnings suffered or extraordinary work-related expenses incurred during the period from which first adversely affected by a lease until the effective date of this implementing arrangement, less any time not available for service due to strike, job action or other cause. Such a make-whole allowance shall be calculated in the manner prescribed in Article I, Section 5 of the *Mendocino Coast* conditions.

Section 8. Test Period

The test period shall include the last twelve (12) months of compensated service that employees performed for their lessor carriers prior to the effective dates of the respective leases, in which months employees performed, at least, ten (10) days of compensated service.

Section 9. Protective Period

The protective period shall not begin to run until the effective date of this implementing arrangement, or when

the employee is adversely affected, whichever shall occur last.

Section 10. Payment of Allowances

All allowances should be paid in full within thirty (30) days after the allowance is due or the claim is sustained, whichever is later; except, dismissal allowance claims which should be paid within ten (10) days of their being sustained.

Section 11. Election of Benefits

Any employee who is eligible for benefits under an existing job security agreement or other protective conditions or arrangements, and the conditions implemented by this arrangement, must elect under which protective arrangement he/she will be protected by sending a letter to Mr. R. Akins, at the above address, within sixty (60) days of the effective date of this implementing arrangement or the date affected by a lease transaction, whichever shall occur last, stating under which protective arrangement he/she elects to be protected. Such an election letter shall not be necessary if the employee files a claim under the protective conditions implemented by this arrangement, in which case the employee shall be deemed to have elected the protections of this arrangment. Failure to file such an election shall not forfeit an employee's right to protection under the other protective arrangement. After the expiration of the period for which such employee is entitled to protection under the arrangement which he/she elects, he/she may then be entitled to protection under the other arrangement for the remainder, if any, of his or her protective period under that arrangement. Under no circumstances shall this section result in the pyramiding or duplication of benefits.

Section 12. Effective Date

This implementing arrangement shall be effective ten (10) days after the Carrier mails a copy of the arrangement, the appropriate claim forms and the appropriate test period calculations to all employees who held seniority on the lines which were leased or who worked for the ST on those lines. If the Postal Service returns any such mailing, the Carrier shall contact the appropriate Union official and shall cooperate with the Union in locating the employee's current address.